

## National Defense Authorization Act (NDAA) for FY 2013

The National Defense Authorization Act (NDAA) is an annual authorization bill; which means that each year the House and Senate Armed Services Committees consider a comprehensive bill that sets procurement and personnel policy for the Department of Defense (DOD) for the next fiscal year. Each NDAA bill includes the following:

- Troop pay and benefits
- Funding for weapons and equipment
- Research and development

### **FY2012 NDAA and AUMF Affirmation:**

The FY 2012 NDAA reauthorization (passed in 2011) included a provision that affirmed the 2001 Congressional Authorization on the Use of Military Force (AUMF) to arrest and indefinitely detain members of al-Qaeda and known terrorists. The purpose of this language is to address the concerns that many citizens and fears House Republicans have with Obama Administration and Congressional Democrats policies when it comes to the capturing and prosecution of terrorists. Following passage of the FY 2012 NDAA, we heard from a few that were concerned that Section 1021 applied to U.S. citizens and legal residents. We believe that Section 1022 of the FY 2012 NDAA clearly exempts U.S. citizens and legal residents from the scope of the bill. You can view FY 2012 NDAA by [CLICKING HERE](#), Section 1021 begins on page 654.

### **FY2013 NDAA**

The latest NDAA reauthorization for FY 2013 added clarifying language to address the outstanding concerns some constituents still had regarding U.S. citizens being arrested and detained without trial.

- The House Armed Service Committee (HASC) included language that states “Nothing in the Authorization for Use of Military Force or the National Defense Authorization Act for Fiscal Year 2012 ‘shall be construed to deny the availability of the writ of habeas corpus in a court ordained or established by or under Article III of the Constitution for any person who is detained in the United States pursuant to the Authorization for Use of Military Force.’”
- There were still some House Members, however, that were of the opinion that this did not fully address the concern and additional amendments were offered to attempt further clarify this issue. In this regard, there were two dominant amendments offered to address Section 1021 and Section 1022 provisions in the FY 2012 NDAA. These amendments are discussed immediately below.

### **Amendments:**

1. The Smith-Amash Amendment proposed two changes to the FY 2013 NDAA. First, the Amendment proposed to ban indefinite military detention and military commission trials in the United States for ALL individuals, including foreign terrorists, apprehended on U.S. soil, who are suspected of terror-related activities, allowing these persons to be tried in a civilian court with all the corresponding constitutional protections of U.S. citizens and legal residents. Second, the amendment would repeal a provision in the FY 2012 NDAA that requires that a category of foreign terrorism suspects be held in military custody, absent a presidential waiver.
  - The amendment would extend full constitutional rights and protections beyond U.S. citizens to anyone, including a foreign terrorist, who is captured in the United States.
  - The amendment would strike key provisions that permit the military to detain, interrogate, and prosecute foreign terrorists who have engaged in acts of war against the United States.
  - The concerns are that by granting terrorists greater rights if they are captured in America than if they are captured overseas is that it would be giving terrorists an incentive to come to the United States to attack us here at home.
  - The Smith/Amash amendment grants foreign terrorists or foreign soldiers greater rights that even our own military personnel do not have in court under our Constitutional Uniform Code of Military Justice (UCMJ).

- **The Smith-Amash Amendment essentially reinforces the Obama Administration doctrine that terrorism is a crime, not an act of war.**
  - **For these reasons, I voted against the Smith-Amash Amendment.**
  - The Heritage Foundation has published an analysis of the Smith-Amash which can be viewed [HERE](#).
2. The Gohmert-Landry-Rigell Amendment (which I voted FOR) would further clarify the right of habeas corpus that is already included in the original bill. **The language of this amendment states**
- Page 366, after line 25, insert the following:**
- (b) NOTIFICATION OF DETENTION OF PERSONS UNDER AUTHORIZATION FOR USE OF MILITARY FORCE.**—Not later than 48 hours after the date on which a person who is lawfully in the United States when detained pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) is so detained, the President shall notify Congress of the detention of such person.
- (c) HABEAS APPLICATIONS.**—A person who is lawfully in the United States when detained pursuant to the Authorization for Use of Military Force (Public Law 107–7 40; 50 U.S.C. 1541 note) shall be allowed to file an application for habeas corpus relief in an appropriate district court not later than 30 days after the date on which such person is placed in military custody.
- This amendment would simply and firmly spell out that the FY 2013 NDAA and the 2001 AUMF do NOT deny the writ of habeas corpus or deny any Constitutional rights for persons detained in the U.S. under the AUMF who are entitled to such rights.
  - The underlying language and the Gohmert / Rigell / Landry approach offer a robust assertion of American’s civil liberties by restating our Constitutional rights of Habeas Corpus.
  - Federal judges have ordered the release of at least 14 GITMO detainees even when the Administration opposed, demonstrating the effectiveness of writ of habeas corpus petitions.

### **Analysis:**

The Smith-Amash Amendment hurts our abilities to protect our soldiers and Americans from the real threat of terrorism. The administration believes that terrorists who attack America at home, like the underwear bomber or the Times Square bomber, should go into civilian law enforcement custody instead of military custody. Instead of treating these individuals like terrorists, they want to treat them like ordinary criminals and to try them in civilian courts. It is vital that foreign terrorists who are focused on waging war against American freedom be treated as enemy combatants according to the laws of war. The Obama Administration is trying to push the country back into a pre-9/11 mindset.

A central lesson we learned from the 9/11 attacks is that it is a mistake to treat al Qaeda terrorists as ordinary criminals. Al Qaeda is at war with the United States and they are bent on destroying our freedoms. For over a decade, our military and our post-9/11 actions/laws have kept America safe by treating the War on Terror as a “war” not as a law enforcement action or as the Obama administrations terminology—“Overseas Contingency Operation.” The Smith-Amash amendment throws these hard learned lessons away and reduces the war on al Qaeda to a routine law enforcement activity.

### **Actual language regarding U.S. citizens in the FY 2012 NDAA bill:**

#### [SUBTITLE D. SEC. 1021. \(p. 655\)](#)

(e) **AUTHORITIES.**—Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.

#### [SUBTITLE D. SEC. 1022. \(p. 657\)](#)

**(b) APPLICABILITY TO UNITED STATES CITIZENS**

**AND LAWFUL RESIDENT ALIENS.—**

**(1) UNITED STATES CITIZENS.**—The requirement to detain a person in military custody under this section does not extend to citizens of the United States.

**Actual language regarding U.S. citizens in the [FY 2013 NDAA](#) bill:**

**Subtitle D—Counterterrorism SEC. 1031. FINDINGS ON DETENTION PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE ENACTED IN 2001.**

Congress finds the following:

(1) In 2001, Congress passed, and the President signed, the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) (hereinafter referred to as the “AUMF”), which authorized the President to “use all necessary and appropriate force” against those responsible for the attacks of September 11, 2001, and those who harbored them “in order to prevent any future acts of international terrorism against the United States”

(2) In 2004, the Supreme Court held in *Hamdi v. Rumsfeld* that the AUMF authorized the President to detain individuals, including a United States citizen captured in Afghanistan and later detained in the United States, legitimately determined to be “engaged in armed conflict against the United States” until the end of hostilities, noting that “[W]e understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.”

(3) The Court reaffirmed the long-standing principle of American law that a United States citizen may not be detained in the United States pursuant to the AUMF without due process of law, stating the following:

(A) “Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship.”

(B) “It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”

(C) “[A] state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

(D) “[A]bsent suspension, the writ of habeas corpus remains available to every individual detained within the United States.”

(E) “All agree suspension of the writ has not occurred here.”

(F) “[A]n enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.”

(G) “Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”

(H) “[U]nless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.” (I) “We reaffirm today the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.”

(4) In 2008, in *Boumediene v. Bush*, the Supreme Court also extended the constitutional right to habeas corpus to the foreign detainees held pursuant to the AUMF at the United States Naval Station, Guantanamo Bay, Cuba.

(5) Chapter 47A of title 10, United States Code, as originally enacted by the Military Commissions Act of 2006 (Public Law 109–366), only allows for prosecution of foreign terrorists by military commission.

(6) In 2011, with the enactment of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81), Congress and the President affirmed the authority of the Armed Forces of the United States to detain pursuant to the AUMF a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks, or a person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

(7) The interpretation of the detention authority provided by the AUMF under the National Defense Authorization Act for Fiscal Year 2012 is the same as the interpretation used by the Obama administration in its legal filings in Federal court and is nearly identical to the interpretation used by the Bush administration. This interpretation has also been upheld by the United States Court of Appeals for the District of Columbia Circuit.

(8) Such Act also requires the Secretary of Defense to regularly brief Congress regarding the application of the detention authority provided by the AUMF.

(9) Section 1021 of such Act states that “Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.”

#### **SEC. 1032. FINDINGS REGARDING HABEAS CORPUS RIGHTS.**

Congress finds the following:

(1) Article 1, section 9 of the Constitution states “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

(2) Regarding the Great Writ, the Supreme Court has noted “The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”

#### **SEC. 1033. HABEAS CORPUS RIGHTS.**

Nothing in the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) or the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81) shall be construed to deny the availability of the writ of habeas corpus in a court ordained or established by or under Article III of the Constitution for any person who is detained in the United States pursuant to the Authorization for Use of Military Force (Public 10 Law 107–40; 50 U.S.C. 1541 note).

The Wall Street Journal recently published an article regarding the FY 2013 NDAA and the Smith-Amash Amendment which expresses their opinions regarding this subject. While I find the use of “Tea Party” in the title of the article, “Tea Party Terror Flakeout”, to be inappropriate, the article is insightful. Most Tea Party Members of Congress remain committed to Tea Party ideals of limited government, following our Constitution, and responsible fiscal behavior. The article can be viewed [HERE](#).